



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

September 30, 1996

Ms. Tamara Armstrong  
Assistant County Attorney  
Travis County  
P.O. Box 1748  
Austin, Texas 78767

OR96-1806

Dear Ms. Armstrong:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 100375.

The Travis County District Attorney's Office received an open records request for "all incident, offense, follow up, and continuation reports as they pertain to" two referenced alleged offenses. You state that you have released some information to the requestor but contend that the remainder of the requested information is protected from required public disclosure under sections 552.101 and 552.111 of the Government Code. We have considered the exceptions you have raised and have reviewed the information at issue.

We first address your contention that all the information submitted to this office for review is protected as attorney work product under section 552.111 of the Government Code. This office recently issued Open Records Decision No. 647 (1996), holding that a governmental body may withhold information under section 552.111 of the Government Code if the governmental body can show (1) that the information was created for civil trial or in anticipation of civil litigation under the test articulated in *National Tank v. Brotherton*, 851 S.W.2d 193 (Tex. 1993), or after a civil lawsuit is filed, and (2) that the work product consists of or tends to reveal an attorney's "mental processes, conclusions, and legal theories." Open Records Decision No. 647 (1996) at 5. The work product doctrine is applicable to litigation files in criminal as well as civil litigation. *Curry v. Walker*, 873 S.W.2d 379, 381 (Tex. 1994) (citing *United States v. Nobles*, 422 U.S. 225, 236 (1975)).

You argue that “[u]nder Curry v. Walker, the Attorney Work Product Doctrine encompasses all the information gathered and all the documents prepared by attorneys, investigators and paralegals in anticipation of prosecution of the case.” We disagree. In *Curry*, the Texas Supreme Court addressed a discovery request for a district attorney’s “entire file,” holding that the request was “too broad” and, citing *National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458, 460 (Tex. 1993), that “the decision as to what to include in [the file] necessarily reveals the attorney’s thought processes concerning the prosecution or defense of the case.” In this instance, however, the requestor seeks only certain specific documents, not the entire file. Thus, in order to withhold any information under section 552.111 as attorney work product, the information (1) must have been created for trial or in anticipation of litigation under the test articulated in *National Tank v. Brotherton*, 851 S.W.2d 193 (Tex. 1993), or after litigation is filed, and (2) must consist of or tend to reveal an attorney’s “mental processes, conclusions, and legal theories.” Open Records Decision No. 647 (1996) at 5. We conclude that you may withhold the requested information to the extent that it meets this test. Of course, you may choose to release all or part of the information that is not otherwise confidential by law. Gov’t Code § 552.007. We find that some of the information submitted to this office<sup>1</sup> is confidential by law and must be withheld from public disclosure under section 552.101 of the Government Code.

You contend that some documents and marked portions of other documents in Exhibit A of the submitted information are excepted from required public disclosure by section 552.101 of the Government Code, which excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” The dissemination of criminal history record information (“CHRI”) obtained from the National Crime Information Center (“NCIC”) is limited by federal law. *See* 28 C.F.R. § 20.1; Open Records Decision No. 565 (1990) at 10-12. The federal regulations allow each state to follow its individual law with respect to CHRI it generates. Open Records Decision No. 565 (1990) at 10-12. Sections 411.083(b)(1) and 411.089(a) of the Government Code authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release the information except to another criminal justice agency for a criminal justice purpose, Gov’t. Code § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from the Texas Department of Public Safety (“DPS”) or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090 - .127. Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations, *see* Open Records Decision No. 565 (1990). In addition, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F.

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<sup>1</sup>We note that not all of the information submitted to this office for review appears to be responsive to the request.

We conclude that you must withhold all the information contained in Exhibit A under section 552.101 of the Government Code as information that is confidential by law.

You contend that certain marked portions of Exhibit B is information which must be withheld under section 552.101 in conjunction with the common-law or constitutional right to privacy. Information must be withheld under section 552.101 under the common-law right of privacy if the information is highly intimate or embarrassing *and* it is of no legitimate concern to the public. *Industrial Foundation of the South v. Texas Industrial Accident Board*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The constitutional right to privacy protects two interests. Open Records Decision No. 600 (1992) at 4 (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)). The first is the interest in independence in making certain important decisions related to the "zones of privacy" recognized by the United States Supreme Court. Open Records Decision No. 600 (1992) at 4. The zones of privacy recognized by the United States Supreme Court are matters pertaining to marriage, procreation, contraception, family relationships, and child rearing and education. *See id.* The second interest is the interest in avoiding disclosure of personal matters. The test for whether information may be publicly disclosed without violating constitutional privacy rights involves a balancing of the individual's privacy interests against the public's need to know information of public concern. *See* Open Records Decision No. 455 (1987) at 5-7 (citing *Fadjo v. Coon*, 633 F.2d 1172, 1176 (5th Cir. 1981)). The scope of information considered private under the constitutional privacy doctrine is far narrower than that under the common law; the material must concern the "most intimate aspects of human affairs." *See* Open Records Decision No. 455 (1987) at 5 (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490, 492 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)).

This office has found that the following types of information are excepted from required public disclosure under constitutional or common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 343 (1982) (information revealing that a particular individual suffers from severe emotional or mental distress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps); information concerning the intimate relations between individuals and their family members, *see* Open Records Decision No. 470 (1987); and identities of victims of sexual abuse or the detailed description of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). In addition, financial information concerning an individual is in some cases protected by a common-law right of privacy. *See* Open Records Decision Nos. 545 (1990), 523 (1989). A previous opinion of this office states that "all financial information relating to an individual . . . ordinarily satisfies the first requirement of common law privacy, in that it constitutes highly intimate or embarrassing facts about the individual, such that its public disclosure would be highly objectionable to a person of ordinary sensibilities." Open Records Decision No. 373 (1983) at 3.

We agree that some of the information you have marked in Exhibit B is protected by common-law or constitutional privacy. We have marked the information that must be withheld under section 552.101 and the common-law or constitutional right to privacy.

Finally, you claim that the presentence investigation reports and all information obtained in connection with a presentence report, submitted as Exhibit C, are confidential under article 42.12 of the Texas Code of Criminal Procedure. We agree. Section 9(j) of article 42.12 provides, in part:

A report and all information obtained in connection with a presentence investigation or postsentence report are confidential and may be released only to those persons and under those circumstances authorized under Subsections (d), (e), (f), (h), (k), and (l) of this section and as directed by the judge for the effective supervision of the defendant.

None of the exceptions appear to apply here. Therefore, you must withhold the information in Exhibit C under section 552.101 of the Government Code.<sup>2</sup>

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read "Todd Reese", with a long horizontal flourish extending to the right.

Todd Reese  
Assistant Attorney General  
Open Records Division

RTR/rho

Ref.: ID# 100375

Enclosures: Marked documents

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<sup>2</sup>As we conclude that all information in Exhibit C must be withheld under section 552.101 in conjunction with article 42.12(9)(j), we do not address your arguments regarding copyright infringement.

cc: Mr. Douglas W. Beeson  
Attorney and Counselor at Law  
6850 Austin Center Blvd., Suite 200  
Austin, Texas 78731  
(w/o enclosures)